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No. 96-

IN THE

Supreme Court of the United States

OCTOBER TERM, 1996

TRAIL MOUNTAIN COAL COMPANY,

Petitioner,

v.

THE UTAH DIVISION OF STATE LANDS AND FORESTRY; RALPH MILES, DIRECTOR OF THE DIVISION OF STATE LANDS AND FORESTRY; THE UTAH DEPARTMENT OF NATURAL RESOURCES; DEE HANSEN, EXECUTIVE DIRECTOR OF THE UTAH DEPARTMENT OF NATURAL RESOURCES,

Respondents.

Petition for a Writ of Certiorari to the Supreme Court of the State of Utah

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PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Utah law allows parties to a contract either to select their own interest rate to apply upon contractual breach or to have a statutory rate applied if none other is specified. In a 1965 mining lease, the State of Utah and Petitioner chose the 6% statutory rate by not specifying a different rate in their contract. In 1982, a State administrative board unilaterally raised the interest rate on unpaid mining royalties to 18%. In 1985, the State administratively determined that Petitioner owed unpaid royalties dating from 1979 and that the new interest rate applied retroactively to these royalties, increasing the State's contractual recovery by over $4,000,000. Accordingly, the question presented is:

> Where a State has entered into a contract with a particular interest rate, does the State violate the Contract Clause by unilaterally changing that interest rate to increase its recovery under the contract?

PARTIES TO THE PROCEEDINGS

All parties to this proceeding are listed in the caption. Sup. Ct. R. 14(1)(b).

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Trail Mountain Coal Company ("Trail Mountain") respectfully petitions for a writ of certiorari to review the judgment of the Utah Supreme Court below.

OPINIONS BELOW

The opinion of the Utah Supreme Court (App. A 1a) is reported at 921 P.2d 1365, and reaffirms an earlier opinion of the Utah Supreme Court in a related case (App. E 41a) reported at 886 P.2d 514. The judgment (App. C 31a) and findings of fact and conclusions of law (App. D 33a) entered by the trial court are not reported.

JURISDICTION

The opinion of the Utah Supreme Court was issued on June 28, 1996. App. A 1a. A timely petition for rehearing was denied on August 23, 1996. App. F 81a. The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(a).

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

Article I, Section 10, Clause 1 of the United States Constitution provides, in pertinent part:

> No State shall * * * pass any Bill of Attainder, ex post facto Law, or Law impairing the Obligation of Contracts * * *.

Utah Code Ann. § 15-1-1 (1953), during the period relevant here provided:

> (1) The parties to a lawful contract may agree upon any rate of interest for the loan or forbearance of any money, goods, or chose in action that is the subject of their contract.
>
> (2) Unless the parties to a lawful contract specify a different rate of interest, the legal rate of interest for the loan or forbearance of any money, goods, or chose in action shall be 6% per annum.

STATEMENT

This case, arising out of the breach of a mineral lease issued by the State of Utah, raises the question whether

a State may retroactively (and dramatically) alter its contractual rights without encountering the constitutional limits established by the Contract Clause. The Utah Supreme Court has decreed that the State of Utah did not impair a "contractual term of [a State] Lease" (App. A 8a) by retroactively setting aside a statutory interest rate incorporated into that Lease and replacing it with an administratively imposed rate some 300% higher. App. E 79a (Bench, J., dissenting). This holding not only conflicts with this Court's long-standing judgment that statutes "affect[ing] the validity, construction and enforcement of contracts" *are* subject to Contract Clause scrutiny (*General Motors Corp. v. Romein*, 503 U.S. 181, 189 (1992); *Von Hoffman v. City of Quincy*, 71 U.S. (4 Wall.) 535, 550 (1867)), it also conflicts with recent federal appellate authority (*In re Workers' Compensation Refund*, 46 F.3d 813 (8th Cir. 1995)) and ignores the original intent animating the Contract Clause. *The Federalist* No. 44 at 282 (James Madison) (C. Rossiter ed., 1961). Review is warranted to remedy the Utah Supreme Court's disregard of settled constitutional principle and ensure that other state courts do not follow Utah's lead.

1. The Mineral Lease

The Trail Mountain Mine is located west of Orangeville, Utah. Included in the mine is State Coal Lease No. ML-22603 (the "Lease"). App. A 2a. The Lease, dated February 8, 1965, was issued to Trail Mountain's predecessor-in-interest on a standard form drafted by the Utah Division of State Lands and Forestry (the "Division"). *Id.*

The Lease grants the right to remove and sell minerals from "school trust lands." Such lands, granted by Congress to the State, are managed by the Division under regulations established by the Utah Board of State Lands and Forestry (the "Board") for the "sole benefit of the common schools." App. E 61a-63a. The Lease provides for the payment of royalties at the higher of two alternative rates: "at the rate of 15¢ per ton," or "at the rate prevailing * * * for federal leases of land of similar char-

acter under coal leases issued by the United States at that time." App. A 3a.

Utah law authorizes "[t]he parties to a lawful contract * * * [to] agree upon any rate of interest for the loan or forbearance of any money, goods, or chose in action that is the subject of their contract." Utah Code Ann. § 15-1-1(1) (1953). As drafted by the State of Utah, the Lease did not contain any provision setting a specific rate for prejudgment interest upon contractual breach. Accordingly, the calculation of prejudgment interest for breach of the Lease was governed by the plain language of Utah Code Ann. 15-1-1(2) (1953):

> Unless parties to a lawful contract specify a different rate of interest, the legal rate of interest for the loan or forbearance of any money, goods, or chose in action shall be 6% per annum.[1]

2. The Royalty Dispute

When the Lease was issued, federal coal leases specified a 15¢ per ton royalty payment. App. B 16a. In August of 1976, however, the federal government changed the method for computing the royalties on federal mineral leases. Rather than a cents-per-ton charge, all new federal leases were issued with a royalty rate of "eight percent of the value of the coal produced." *Id.* The new federal percentage royalty raised the question, for the first time, whether Lease royalties were payable at 15¢ per ton or (under the alternative royalty clause) "at the rate prevailing . . . for federal leases of land of similar character under coal leases issued by the United States at that time." App. A 3a.

Following the change in the royalty rate for newly issued federal leases, and on instructions from the State, Trail Mountain (along with other State lessees) con-

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[1] The current version of § 15-1-1(2) provides a 10% legal rate of interest. Utah Code Ann. § 15-1-1(2) (1992). The revised statute, however, "is not applicable" to any contract made before May 14, 1981. App. A 4a n.5.

tinued to pay the 15¢ per ton royalty. In Trail Mountain's case, "various Division employees * * * informed Trail Mountain that 15 cents per ton was the correct rate for the Lease." App. A 4a. This instruction was based upon the Division's determination that, under the plain language of the Lease, the alternative royalty clause did not apply until producing "Federal leases in the same area" as a State Lease were adjusted to the new (and higher) percentage royalty rate. App. I 87a.

In 1985, the Division conducted an audit of "various coal leases." App. B 17a. The audit was premised upon an entirely new reading of the Lease's alternative royalty clause. Rejecting its prior determination that the alternative rate was triggered "at such time" as new "Federal leases in the same area" as a State Lease "begin[] production" (App. I 87a), the Division concluded that the alternative royalty clause applied from the moment the federal government issued *any* new leases on a percentage, rather than a cents-per-ton, basis. Under this new interpretation, Trail Mountain had underpaid its royalty obligation through 1985 by $3,351,474.75. App. A 4a.

The Division also claimed the State was entitled, not only to prejudgment interest on the unpaid royalties, but to prejudgment interest at a significantly higher rate than the 6% provided by Utah Code Ann. § 15-1-1(2) (1953). In 1982, the Utah Board of State Lands and Forestry had adopted regulations providing for 18% interest on unpaid royalties. App. G 82a.[2] The Division asserted that, notwithstanding the 6% prejudgment interest rate incorporated into the contract by the operation of § 15-1-1(2), Trail Mountain was obligated to pay the Board's dramatically higher interest rate. So calculated, Trail Moun-

[2] In 1986, the Board changed the rate again—this time to a floating rate indexed against the "Prime Rate" (plus a penalty of 4%). Rather than providing for simple interest, the Board designed the 1986 rate to compound, significantly accelerating the rate at which interest accrued. As applied, the 1986 revised rate guaranteed the State a simple rate of return in excess of 17% on unpaid coal royalties. App. G 82a.

tain owed $6,105,638.22 in interest through March 1992 (App. H 85a), rather than the $2,070,955.93 accruing under § 15-1-1(2) during the same period. App. C 32a. The Division justified its retroactive trebling of Trail Mountain's prejudgment interest obligation on the ground that the State was entitled to receive "full value" for the lease of school trust assets. App. A 6a. *Cf. Lassen v. Arizona ex rel. Arizona Highway Dep't*, 385 U.S. 458, 466 (1967) (states must obtain "full value" for the disposition of school trust lands).

3. Lower Court Proceedings

After exhausting its administrative remedies, Trail Mountain filed an action in state district court to enjoin the Division from collecting additional royalties and prejudgment interest at the newly imposed interest rate. App. A 4a-5a. The trial court initially concluded that the alternative royalty clause was impermissibly vague and, therefore, unenforceable. App. E 45a. The Division appealed that decision to the Utah Supreme Court, which consolidated Trail Mountain's case with three other challenges to the Division's new interpretation of the State's standard coal lease. App. A 5a. The Utah Supreme Court reversed and remanded.

On remand, the trial court adopted the Division's new reading of the alternative royalty clause. The trial court concluded that, although the alternative royalty clause was "ambiguous," Trail Mountain nevertheless "had the legal obligation to pay the higher rate commencing at the time the federal rate was increased to 8%." App. D 35a, 38a. But, while holding that Trail Mountain had breached the Lease by underpaying royalties, the trial court rejected the Division's assertion that the State could recover prejudgment interest in excess of the 6% set by § 15-1-1(2).

In reliance upon settled Utah law,[8] the court held that the Division was only entitled to collect "the legal rate in effect at the time the Lease was executed." App. D 39a.

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[8] *Ringwood v. Foreign Auto Works, Inc.*, 786 P.2d 1350, 1358 (Utah Ct. App. 1990) (absent a contrary agreement regarding

> The Board [of State Lands and Forestry] had no right by regulation to change the monetary obligation undertaken by [Trail Mountain in] the Lease. If such authority were allowed, the Board could set any arbitrary rate that it saw fit and rewrite the monetary obligation under the Lease.

Id.; compare United States Trust Co. v. New Jersey, 431 U.S. 1, 25-26 (1977) ("If a State could reduce its financial obligations whenever it wanted to spend the money for what it regarded as an important public purpose, the Contract Clause would provide no protection at all"). The obligation of the State to receive "full value" for school trust properties, the court concluded, was fulfilled by the State's receipt of "the legal rate of interest on delinquent payments." App. D 39a.

On cross appeals by Trail Mountain and the State, the Utah Court of Appeals affirmed the trial court's conclusion that Trail Mountain was obligated to pay additional royalties. App. B 19a-21a. The court of appeals, however, also affirmed the lower court's refusal to award the Division prejudgment interest in excess of 6%.

The court of appeals recognized that, unless the parties to a lawful contract agree to a specific interest rate, "Utah

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prejudgment interest, "Utah law provides that the legal rate is applicable in instances where the parties have not agreed on a specified rate"), *cert. denied*, 795 P.2d 1138 (Utah 1990); *Mont Trucking, Inc. v. Entrada Indus. Inc.*, 802 P.2d 779, 782 (Utah Ct. App. 1990) (absent a contrary specified rate, upon a finding of breach of contract, "[t]he trial judge [is] * * * required as a matter of law to award the statutorily mandated rate"); *Vassels v. LoGuidice*, 740 P.2d 1375, 1378 (Utah Ct. App. 1987) (citing *Golden Key Realty, Inc. v. Mantas*, 669 P.2d 730 (Utah 1985)) (prejudgment interest "accrue[s] as damages arising out of a valid contract determined to have been breached by the other party"); *SCM Land Co. v. Watkins & Faber*, 732 P.2d 105, 108-109 (Utah 1986) (allowing prejudgment interest at six rather than ten percent because the "lease that was breached was executed prior" to the increase in the legal rate); *Davies v. Olson*, 746 P.2d 264, 270 (Utah Ct. App. 1987) (statutory rate in force at time contract is executed applies).

law establishes [a 6%] rate of prejudgment interest." App. B 28a. The court concluded that the Division lacked the power to "deviat[e] from the statutory rate of prejudgment interest." *Id.* "Were we to rule otherwise," the court held, "the State Land Board could simply change the material terms of a lease by subsequent unilateral fiat." *Id.*

4. Decisions Below

A. *Consolidation Coal:* While the present matter was pending in the Utah Court of Appeals, the Utah Supreme Court accepted review of another case challenging the legal validity of the Division's new construction of Utah's standard coal lease. *Consolidation Coal Co. v. Utah Div. of State Lands and Forestry*, 886 P.2d 514 (1994) (App. E 41a). In *Consolidation Coal*, issued shortly after the Utah Court of Appeals ruled in this case,[4] the Utah Supreme Court held that a lessee in the position of Trail Mountain was obligated to pay the alternative percentage royalty. App. E 48a-57a. The court then concluded (without once adverting to possible Contract Clause implications) that the lessee was obligated to pay the State's retroactively imposed 18% prejudgment interest rate. App. E 60a.

One member of the *Consolidation Coal* panel, however, dissented on the express ground that the retroactive prejudgment interest rate violated the Contract Clause. Judge Bench, a member of the Utah Court of Appeals sitting by designation, concluded that because "the parties [to the mineral lease] did not specify a prejudgment interest rate," the 6% rate established by "section 15-1-1 was incorporated by operation of law into the contract." App. E 78a (Bench, J., dissenting). As a result, the Division's abrogation of that contractual term ran "headlong into constitutional prohibitions." App. E 77a. According to Judge Bench, "[t]he State has no authority to modify,

[4] The court of appeals' opinion in this case was entered on October 27, 1994. App. B 14a. The Utah Supreme Court's opinion in *Consolidation Coal* was entered on December 2, 1994. App. E 41a.

unilaterally and at-will, the statutory interest rate in effect when the parties entered into the contract." App. E 74a.

> It is a fundamental principle of constitutional law that a state may not pass a law altering the nature and legal effect of an existing contract to the prejudice of either party to the contract. * * * It is likewise a fundamental principle of constitutional law that the state may not pass a law altering a contractual remedy when the remedy is material to the contract. *Kirkman v. Bird*, 22 Utah 100, 111-12, 61 P. 338, 339-40 (1900).

App. E 77a (citation and parenthetical omitted).

B. *Trail Mountain:* Following *Consolidation Coal*, the Utah Supreme Court granted review in this case. The court concluded that Trail Mountain was obligated to pay additional royalties under the alternative royalty clause and held that the Board was entitled to suspend the operation of Utah Code Ann. § 15-1-1(2) and collect, instead, the 18% interest rate established by its regulations. App. A 10a. The Utah Supreme Court also explained (for the first time) why this result did not violate the Contract Clause.

The court noted that the Lease "was 'granted subject in all respects to and under the conditions of the laws of the State of Utah and existing rules and regulations and such operating rules and regulations as may be hereafter approved and adopted by the State Land Board.'" App. A 3a (quoting Lease). In reliance on this contractual provision, the court held that "when the Division sought to enforce" the new "interest and penalty measures," it was "merely acting pursuant to a right it held under the contract, and no contractual term of the Lease was impaired." App. A 8a. *But cf.* App. E 63a (Utah Supreme Court, in *Consolidation Coal*, holding that § 15-1-1(2) "would apply" to calculation of prejudgment interest absent the Board's retroactive rate).

The Utah Supreme Court conceded that this Court, in *General Motors Corp. v. Romein*, 503 U.S. 181 (1992),

had reaffirmed that " 'state laws are implied into private contracts regardless of the assent of the parties' " when " 'those laws affect the validity, construction, and enforcement of contracts.' " App. A 9a (quoting *Romein*, 503 U.S. at 189). Straightforward application of *Romein*, of course, would yield the conclusions (1) that Utah Code Ann. § 15-1-1(2) was incorporated into the Lease because the statute controls the calculation of contractual damages and, therefore, (2) the State's replacement of a 6% statutory rate with an 18% interest rate unconstitutionally impaired the Lease obligation undertaken by Trail Mountain. *Accord, Kirkman v. Bird*, 22 Utah 100, 111-12, 61 P. 338, 339-40 (Utah 1900) ("The remedy subsisting in a state when and where a contract is made and is to be performed is a part of its obligation, and any subsequent law of the state which so affects that remedy as substantially to impair and lessen the value of the contract is forbidden by the constitution, and is therefore void").

The Utah Supreme Court, however, avoided these obvious results by proclaiming that "regulations which altered the rate of prejudgment interest over time did not affect the 'validity, construction, [or] enforcement' of the contract between Trail Mountain and the Division" because the "regulations simply affected the calculation of the remedy granted for a breach of the terms of the Lease." App. A 10a. According to the court, the State of Utah's retroactive trebling of Trail Mountain's prejudgment interest obligation under the Lease "did not alter any of the essential elements of the contract." App. A 8a n.8.

REASONS FOR GRANTING THE PETITION

Review is warranted for three reasons.

First, the Utah Supreme Court's conclusion that "no contractual term of the Lease was impaired" (App. A 8a) by the State's deletion of Utah Code Ann. § 15-1-1(2) from its mineral lease conflicts with (indeed, disregards) this Court's opinion in *General Motors Corp. v. Romein*, 503 U.S. 181 (1992). *Romein* announced that statutes which "affect the validity, construction, and enforcement

of contracts" *are* implied into * * * contracts" and *are* subject to Contract Clause scrutiny. *Romein*, 503 U.S. at 189. Contrary to the Utah Supreme Court's remarkable declaration that "regulations which altered the rate of prejudgment interest over time did not affect the * * * enforcement of the [State's] contract" (App. A 10a) (internal quotations omitted), Utah's replacement of an incorporated 6% interest term with a newly minted 18% rate unquestionably constituted a "substantial" impairment of a "contractual relationship." *Romein*, 503 U.S. at 186.

Second, the Utah Supreme Court's total disregard of the Contract Clause conflicts, not only with the controlling precedent of this Court, but with the Founders' design and a recent federal circuit court decision. The Clause was crafted for the express purpose of moderating "the fluctuating policy" that could otherwise "direct[] the public councils." *The Federalist* No. 44 at 282 (James Madison) (C. Rossiter ed., 1961). The Clause can hardly stand as a "constitutional bulwark in favor of personal security and private rights" (*id.*) if States are permitted to augment their contractual rights at will. Indeed, precisely because of this fact, the United States Court of Appeals for the Eighth Circuit has recently repudiated the precise reasoning adopted by the Utah Supreme Court. *In re Workers' Compensation Refund*, 46 F.3d 813 (1995).

Third, and finally, review is warranted to ensure the continued validity of "a simple constitutional principle: government *must keep its word.*" Laurence H. Tribe, American Constitutional Law, § 9-10, at 619 (2d ed. 1988) (emphasis in original, footnotes omitted). Just last Term, the Court reaffirmed the fundamental rule that, when government " 'enters into contract relations, its rights and duties therein are governed generally by the law applicable to contracts between private individuals.' " *United States v. Winstar Corp.*, 116 S.Ct. 2432, 2464-2465 (1996) (quoting *Lynch v. United States*, 292 U.S. 571,

579 (1934) (Brandeis, J.)). No *private* contractor would be permitted retroactively to augment its contractual rights by over $4 million. The State of Utah should not be ceded the identical (and, in its hands, tyrannical) power. *United States Trust Co. v. New Jersey*, 431 U.S. 1 (1977).

I. THE DECISION BELOW CONFLICTS WITH *ROMEIN*

The decision of the Utah Supreme Court rests upon two interrelated assertions: (1) because the " 'Lease is expressly subject to the laws of Utah,' " the State can alter its contractual remedies at will (App. A 8a), and (2) the State, in any event, can supplant Utah Code Ann. § 15-1-1 (2) without impairing a "contractual term." *Id.* The first submission warrants review because it disregards the original intent animating the Contract Clause and the careful limits erected by the federal courts to circumscribe the power of a State to alter its own contracts. Sections II, III, *infra; Romein*, 503 U.S. at 190-191 (rejecting the Utah Supreme Court's first assertion); *In re Workers' Compensation Refund*, 46 F.3d 813 (8th Cir. 1995) (same). The second submission, for its part, conflicts with numerous pronouncements from this Court (most recently in *Romein*). The Court should grant review to prevent other state courts from emulating Utah's blithe disregard of the controlling Contract Clause pronouncements of this Court.

1. The first step in Contract Clause analysis is "whether [a] change in state law has 'operated as a substantial impairment of a contractual relationship.' " *Romein*, 503 U.S. at 186 (quoting *Allied Structural Steel Co. v. Spannaus*, 438 U.S. 234, 244 (1978)). That inquiry has "three components: whether there is a contractual relationship, whether a change in law impairs that contractual relationship, and whether the impairment is substantial." *Romein*, 503 U.S. at 186. Here, the Lease plainly establishes a contractual relationship between the State of Utah and Trail Mountain. The Utah Supreme Court, however, concluded that the State's nullification of § 15-1-1(2) did

not alter a "contractual term." App. A 8a. This is plain error.[5]

To begin with, the statute involved here *expressly* furnishes a contractual term: "[u]nless the parties to a lawful contract specify a different rate of interest," the Utah Code proclaims that "the legal rate of interest for the loan or forbearance of any money, goods, or chose in action *shall* be 6% per annum." Utah Code Ann. § 15-1-1(2) (emphasis added). Implicit in this statutory scheme is the command that, absent contrary agreement by the parties, all contracts in the State of Utah require payment of prejudgment interest at the "legal rate." *Accord*, Utah Code

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[5] The Utah Supreme Court cited only one case to support its result, *Morely v. Lake Shore & Mich. S. Ry.*, 146 U.S. 162, 168-71 (1892). *Morley*, however, is not on point and in fact *rejects* the reasoning of the Utah Supreme Court.

Morley sustained legislative alteration of *postjudgment* interest against a Contract Clause challenge. 146 U.S. at 168-172. But, in so doing, this Court expressly distinguished prejudgment interest, which "is in the nature of damages" for contractual breach and cannot be legislatively altered (146 U.S. at 168), from postjudgment interest, which "duty is created by the statute, and not by the agreement of the parties." 146 U.S. at 169. This case, of course, involves a prejudgment interest obligation created "by the agreement of the parties" that operates to provide relief "in the nature of damages" 146 U.S. at 168-169. *Accord, L&A Drywall, Inc. v. Whitmore Const. Co.*, 608 P.2d 626, 629 (Utah 1980) (rejecting the argument that "prejudgment interest" under § 15-1-1(2) is "independent of the terms of [an] agreement itself" because the argument is a "fallacious characterization" of Utah law; "'[p]rejudgment interest' represents an amount awarded as damages due to the opposing party's delay in tendering the amount owing under an obligation"); *Vali Convalescent and Care Institts. v. Div. of Health Care Fin.*, 797 P.2d 438, 445 (Utah Ct. App. 1990) (rejecting the contention that § 15-1-1(2) "creates a statutory right to interest;" the statute "does nothing more than define what the rate of interest should be in those instances where interest accrues as a matter of law but no specific rate has been agreed to"). According to *Morley*, an "amount awarded as damages due to the opposing party's delay in tendering the amount owing under an obligation" (*L&A Drywall, Inc.*, 608 P.2d at 629) is *not* subject to legislative alteration. *Morley*, 146 U.S. at 168. *Morley*, therefore, refutes rather than supports the Utah Supreme Court's holding.

Ann. § 15-1-1(1) (authorizing parties to "agree upon any rate of interest" to supplant the "legal rate" provided by subsection (2)); authority cited at *supra* note 3. In these circumstances, the general rule that " 'the laws which subsist at the time and place of the making of a contract * * * enter into and form a part of it' " (*Home Building & Loan Ass'n v. Blaisdell*, 290 U.S. 398, 429-430 (1934) (quoting *Von Hoffman v. City of Quincy*, 71 U.S. (4 Wall.) 535, 540 (1867)) has special force.

This Court, in fact, has specifically noted that pre-judgment interest statutes, such as § 15-1-1(2), *are* incorporated contractual terms. In *Von Hoffman v. City of Quincy*, the Court (after noting that contemporaneous state laws are incorporated into a contract) concluded that:

> [t]his principle embraces alike those [laws] which affect [a contract's] validity, construction, discharge, and enforcement. *Illustrations of this proposition are found, in the obligations of the debtor to pay interest after the maturity of the debt, where the contract is silent. * * *. These are as much incidents and conditions of the contract as if they rested upon the basis of a distinct agreement.*

Von Hoffman v. City of Quincy, 71 U.S. (4 Wall.) at 549; *accord, Edwards v. Kearzey*, 96 U.S. 595, 600 (1877) (the "obligation of a contract includes every thing within its obligatory scope" and "[a]mong these elements nothing is more important than the means of enforcement. This is the breath of its vital existence").

The result mandated by *Von Hoffman*, moreover, has recently been reaffirmed. Just four years ago, this Court declared that "state laws are implied into private contracts regardless of the assent of the parties" when "those laws affect the validity, construction, and enforcement of contracts." *Romein*, 503 U.S. at 189. The *Romein* Court explained at some length why certain laws are subject to Contract Clause analysis:

> While it is somewhat misleading to characterize laws affecting the enforceabiilty of contracts as "incorporated terms" of a contract, see 3 A. Corbin, Contracts § 551, pp. 199-200 (1960), these laws are subject to Contract Clause analysis because, without them, contracts are reduced to simple, unenforceable promises. "The obligation of a contract consists in its binding force on the party who makes it. This depends on the laws in existence when it is made; these are necessarily referred to in all contracts, and forming a part of them as the measure of the obligation to perform them by the one party, and the right acquired by the other. * * * If any subsequent law affect to diminish the duty, or to impair the right, it necessarily bears on the obligation of the contract." *McCracken v. Hayward*, 2 How. 608, 612 (1844). See also *Van Hoffman v. City of Quincy, supra.* * * * For this reason, changes in the laws that make a contract legally enforceable may trigger Contract Clause scrutiny if they impair the obligation of pre-existing contracts, even if they do not alter any of the contract's bargained-for terms. See, e.g., *Von Hoffman v. City of Quincy, supra*, (repeal of tax designed to repay bond issue); *Bronson v. Kinzie*, 1 How. 311, 316 (1843) (law limiting foreclosure rights); *McCracken v. Hayward, supra*, 2 How. at 611-64 (same).

Romein, 503 U.S. at 189-190.

The decision below unquestionably conflicts with *Romein*. The statutory obligation to pay 6% interest upon breach had " 'binding force' " on Trail Mountain at the time the Lease was executed and was " 'the measure of the obligation to perform' " assumed by the company. *Romein*, 503 U.S. at 189 (quoting *McCracken*, 2 How. at 612). The State's retroactive trebling of that duty " 'necessarily bears on the obligation of the contract.' " *Id.* Accordingly, the State of Utah's retroactive imposition of $4 million in additional prejudgment interest upon Trail Mountain undeniably—and substantially[6]—"impair[s] the

[6] As a result of the retroactive interest rate imposed upon Trail Mountain, the company's prejudgment interest obligation has mush-

obligation of [a] pre-existing contract[]." *Romein*, 503 U.S. at 189.

2. The Utah Supreme Court's bald evasion of this Court's established precedent from *Von Hoffman* through *Romein* merits review. Whether or not a contract has been unconstitutionally impaired is a question of federal—not state—law. *Romein*, 503 U.S. at 187. As the Court explained in *Indiana ex rel. Anderson v. Brand*, 303 U.S. 95, 100 (1938):

> in order that the constitutional mandate may not become a dead letter, we are bound to decide for ourselves whether a contract was made, what are its terms and conditions, and whether the State has, by later legislation, impaired its obligation.

The Court "must answer * * * [t]hese questions * * * independently of the conclusion of th[e state] court," for "we can not perform our duty to enforce the guaranty of the Federal Constitution as to the inviolability of contracts by state legislative action unless we give the questions independent consideration." *Appleby v. City of New York*, 271 U.S. 364, 379-380 (1926); *see also Municipal Investors Ass'n v. Birmingham*, 316 U.S. 153, 157 (1942); *Irving Trust Co. v. Day*, 314 U.S. 556, 561-562 (1942).

In this case, the Court has a clear "duty to enforce the guaranty of the Federal Constitution" (*Appleby*, 271 U.S. at 379-380) because the Utah Supreme Court has read Trail Mountain's contract in a manner that effectively renders the Contract Clause "a dead letter." *Brand*, 303 U.S. at 100. The State of Utah's retroactive displacement of a 6% contractual term with an interest rate three times higher does not involve a "generally applicable rule of conduct designed to advance 'a broad societal interest' " where Contract Clause concerns may well be incidental.

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roomed to over $6 million (App. H 85a), a figure three times the amount owing under § 15-1-1(2) and nearly double the underpaid royalty obligation upon which the interest award is based. App. C 32a.

Exxon Corp. v. Eagerton, 462 U.S. 176, 191 (1983) (*quoting Allied Structural Steel Co. v. Spannaus*, 438 U.S. 234, 249 (1978)). On the contrary, the State's action involves a State-fashioned "rule limited in effect to contractual obligations or remedies." *Id.*

Moreover, the prejudgment interest rate imposed by the State of Utah is not only aimed at "contractual obligations or remedies," *it is aimed at the State's own contractual rights. Exxon Corp.*, 462 U.S. at 191, 192 n. 13 (emphasizing the "special concerns associated with a State's impairment of its own contractual obligations").[7] If the State of Utah's retroactive 300% augmentation of its *own* contractual rights is permitted to stand, it is difficult to conceive of *any* future action by the State that *will* trigger Contract Clause scrutiny. The Clause, at least in Utah, will become a mere artifact.

There is also grave danger that—absent review—the Contract Clause will be seriously debilitated beyond the borders of Utah. The Utah Supreme Court's analysis not only conflicts with decisions from this and other courts (*Romein*, 503 U.S. at 189; *In re Workers' Compensation Refund*, 46 F.3d at 818-819),[8] it could

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[7] *Accord, In re Workers' Compensation Refund*, 46 F.3d 813 at 820 (8th Cir. 1995) ("Although states have broad discretion under their police powers to regulate existing contractual relationships, such regulation must protect a 'broad societal interest rather than a narrow class' " in order to insure "that 'the State is exercising its police power, rather than providing a benefit to special interests' ") (*quoting Allied Structural Steel Co. v. Spannaus*, 438 U.S. 234, 249 (1978), and *Energy Reserves Group, Inc. v. Kansas Power & Light Co.*, 459 U.S. 400, 412 (1983)).

[8] *E.g., Caritas Servs., Inc. v. Dep't of Social and Health Servs.*, 869 P.2d 28, 36 (Wa. 1994) ("Parties are generally deemed to contract in reliance on existing law"); *Ass'n of Surrogates and Supreme Court Reporters v. State*, 588 N.E.2d 51, 53 (N.Y. Ct. App. 1992) ("When the contracts were negotiated, the existing statutes . . . were incorporated into them and continued as part of the agreement until new agreements were executed. . . . [T]he obligation of the contracts included 'not only the express terms but also the contemporaneous state law pertaining to [their] interpretation

well serve as a hornbook for future "creative avoidance" of the Contract Clause in other jurisdictions. Every state in the nation has a prejudgment interest statute that operates similarly to § 15-1-1(2).[9] Numerous states, further-

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and enforcement' ") (quoting *United States Trust Co. v. New Jersey*, 431 U.S. at 19-20 n.17); *Wynne v. New Orleans Clerks and Checkers Union, Local 1497*, 550 So.2d 1352, 1354 (La. App. 1989) (" 'It is a fundamental principle that laws existing at the time a contract is entered into are incorporated into a contract and form a part of the contract as though expressly written therein' ") (quoting *Board of Comm'rs v. Dept. of Natural Resources*, 496 So.2d 281, 294 (La. 1986)); *State ex rel. Cannon v. Moran*, 331 N.W.2d 369, 374 (Wis. 1983) ("Courts have long recognized that under the contract clause a contract includes the laws existing at the time it was made"); *Nieves v. Hess Oil Virgin Islands Corp.*, 819 F.2d 1237, 1244 (3d Cir. 1986) (" 'The obligations of a contract have been regarded as including not only the express terms but also the contemporaneous state law pertaining to interpretation and enforcement' ") (quoting *Blaisdell*, 290 U.S. at 429-430), *cert. denied*, 484 U.S. 963 (1988); *In re LaFortune*, 652 F.2d 842, 846 (9th Cir. 1981) ("the laws which existed at the time the contract was entered into and which affect its validity, construction, discharge and enforcement, in effect, are incorporated within the contract").

[9] Ala. Code §§ 8-8-8 (1993); Alaska Stat. §§ 09.30.070 (1994); Ariz. Rev. Stat. Ann. § 44-1201 (Supp. 1994); Ark. Code Ann. § 16-65-114 (1987); Cal. Civ. Code §§ 3287 to -3291 (1970 & West Supp. 1996); Colo. Rev. Stat. 5-12-101 to -102 (1996); Conn. Gen. Stat. Ann. §§ 37-1 to -3-1(a) (Supp. 1996); Del. Code Ann. Tit. 6, §§ 2301, 2303 (1993); Fla. Stat. Ann. § 55.03 (West Supp. 1996); Ga. Code Ann. §§ 7-4-12 to -15 (1989); Haw. Rev. Stat. §§ 478-2 to -3 (1993 & Supp. 1995); Idaho Code § 28-22-104 (1996); Ill. Rev. Stat. Ch. 735 § 5/2-1303 (1993); Ind. Code Ann. §§ 24-4.6-1-101 to -103 (1995 & Burns Supp. 1996); Iowa Code Ann. §§ 535.3 (1987 & West Supp. 1996); Kan. Stat. Ann. §§ 16-201 to -205 (1995); Ky. Rev. Stat. Ann. §§ 360.010, .040 to .050 (1987); La. Rev. Stat. Ann. § 13-4203, La. Civ. Code art. 2924 (1991 & Supp. 1996); Me. Rev. Stat. Ann. Tit. 14, § 1602 (Supp. 1995); Md. Code Ann. Courts § 11-106 (1986); Mass. Ann. Laws Ch. 231, §§ 6c (1986); Mich. Comp. Laws § 600.6013 (Supp. 1996); Minn. Stat. Ann. § 334.01 (1994); Miss. Code Ann. §§ 75-17-1 and -7 (Supp. 1995); Mo. Ann. Stat. § 408.020 (1990); Mont. Code Ann. 27-1-211 (1993); Neb. Rev. Stat. §§ 45-103-103.04 (Supp. 1995); Nev. Rev. Stat. §§ 17.130(2), 99.040 (1995); N.H. Rev. Stat. Ann.

more, manage public trust properties under obligations to obtain full (or fair) value upon their disposition.[10] The decision below—by demonstrating how prejudgment interest statutes can be ignored and public trust responsibilities exploited—is an enticing outline for the constitutionally effective rewriting of thousands of contracts held by financially strapped States. *Cf. United States Trust Co. v. New Jersey*, 431 U.S. 1, 25-26 (1977) ("A governmental entity can always find a use for extra money, especially when taxes do not have to be raised").

The Court should grant review to prevent unwarranted erosion of the Contract Clause in Utah and elsewhere. As set out in the next Section, the Contract Clause was drafted precisely to prevent fluctuating [State] policy" from retrospectively upsetting legitimate economic expectations.

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§§ 336:1 -:2, 524:1-a to -b (1984 & 1995 Supp.); N.J. Stat. Ann. § 31:1-1 (1990); N.M. Stat. Ann. § 56-8-3, -4 (1996); N.Y. Civ. Prac. Law §§ 5001-5004 (McKinney 1992 & Supp. 1996); N.C. Gen. Stat. § 24-1, -5 to -7 (1995); N.D. Cent. Code § 32-03-03, -04 and -09 (1996); Ohio Rev. Code Ann. §§ 1343.01-.03 (1993); Okla. Stat. Ann. tit. 12, § 727 (1988 & Supp. 1996); Or. Rev. Stat. § 82.010 (1995); 41 Pa. Const. Stat. Ann. § 202 (1992 & Supp. 1996); R.I. Gen. Laws §§ 9-21-8, -10 (1985 & Supp. 1995); S.C. Code Ann. §§ 11-9-350, 34-31-20, 37-10-106 (1987 & Supp. 1995); S.D. Codified Laws Ann. § 21-2-1 to -10 (1987 & Supp. 1996); Tenn. Code Ann. §§ 47-14-121 to -123 (1995); Tex. Stat. Ann. § 5069-1.05 (Supp. 1996); Vt. Stat. Ann. tit. 9, § 41a(a) (1993); Va. Code Ann. § 6.1-330.54 (1993); Wash. Rev. Code Ann. §§ 4.56.110, 6.44.090, 19.52.010 to .020 (1991 & Supp. 1996); W.Va. Code § 56-6-29 to -31 (1966 & Supp. 1996); Wis. Stat. Ann. §§ 138.04, 815.05(8) (1989 & 1995); Wyo. Stat. § 40-14-106(e) (1993).

[10] States manage lands under a variety of trust doctrines; state and federal trust doctrines often require states "to sell or rent the lands only for fair market value." George Cameron Coggins et al., 1 *Public Natural Resources Law* § 10C.02[8]; *see, e.g., Lassen v. Arizona ex rel. Arizona Highway Dep't*, 385 U.S. 458, 466 (1967); *see also Dept. of State Lands v. Pettibone*, 702 P.2d 948 (Mont. 1985); *Kanaly v. State*, 368 N.W.2d 819, 824 (S.D. 1985); *County of Skamania v. State*, 685 P.2d 576 (Wa. 1984); *Oklahoma Educ. Ass'n v. Nigh*, 642 P.2d 230, 235 (Okla. 1982); *State v. Univ. of Alaska*, 624 P.2d 807 (Alaska 1981); *Anderson v. Bd. of Educ. Lands & Funds*, 256 N.W.2d 318 (Neb. 1977).

The Federalist No. 44 at 282 (James Madison) (C. Rossiter ed., 1961). Review is necessary to preserve this basic mission of the Clause.

II. THE OPINION BELOW DISREGARDS THE ORIGINAL INTENT ANIMATING THE CONTRACT CLAUSE AND CONFLICTS WITH A RECENT COURT OF APPEALS DECISION

The court below held that the State of Utah had the right to alter its contractual remedies at will because the Lease, as issued, was " 'subject to the laws of Utah.' " App. A 8a. This argument improperly disregards the original intent animating the Contract Clause and conflicts with a recent decision from the United States Court of Appeals for the Eighth Circuit. *In re Workers' Compensation Refund*, 46 F.3d 813 (8th Cir. 1995). As the Eighth Circuit has recognized, the Contract Clause was written into the Constitution expressly *to deprive* the States of the very power exercised by the State of Utah. Review is warranted, not only to preserve the Founders' intent, but to restore uniform application of the Contract Clause in both state and federal courts.

In *The Federalist* No. 10, perhaps the most important of the Federalist papers, Madison stated that "the protection of [the] faculties of acquiring property" is "the first object of government." *The Federalist* No. 10 at 78 (James Madison) (C. Rossiter ed., 1961).[11] Madison particularly feared the threat to property resulting from "[t]he mutability of the laws of the States," and wrote that the "injustice" and "evils issuing from" frequent changes in state laws "contributed more to the uneasiness which

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[11] *See also* Schwartz, *Old Wine in Old Bottles? The Renaissance of the Contract Clause*, 1979 Sup. Ct. Rev. 95, 120; McConnell, *Contract Rights and Property Rights: A Case Study in the Relationship Between Individual Liberties and Constitutional Structure*, 76 Calif. L. Rev. 267, 270 (1988); Katz, *Thomas Jefferson and the Right to Property in Revolutionary America*, 19 J. L. & Econ. 467, 469-470 (1976); E. Johnson, *The Foundations of American Economic Freedom* 191-192 (1973); J. Nedelsky, *Private Property and the Limits of American Constitutionalism* chs. 2, 5 (1990).

produced the [Constitutional] Convention" than any other inadequacy of the Articles of Confederation. 5 *The Writings of James Madison* 27 (letter of Oct. 24, 1787) (G. Hunt ed., 1904). Accordingly, the Contract Clause—a "constitutional bulwark in favor of personal security and private rights"—was designed precisely to prevent state legislation from upsetting legitimate economic expectations founded upon the law of contract. *The Federalist* No. 44 at 282 (James Madison) (C. Rossiter ed., 1961).[12]

The decision of the Utah Supreme Court improperly ignores this fundamental mission of the Contract Clause. The Utah court has decreed that—because the Lease is " 'subject to the laws of Utah' " (App. 8a)—Trail Mountain has no right to insist that the legal rights and duties created by the contract be enforced according to their terms. Rather, Trail Mountain must simply accommodate itself to the reality that the Lease can be continually refashioned to suit the State's current policy. This result is constitutionally insupportable. Although the Lease is subject to the laws of Utah, the laws of Utah are subject to

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[12] As Madison explained (*The Federalist* No. 44 at 282 (James Madison) (C. Rossiter ed., 1961)):

> The sober people of America are weary of the fluctuating policy which has directed the public councils. They have seen with regret and indignation that sudden changes and legislative interferences, in cases affecting personal rights, become jobs in the hands of enterprising and influential speculators, and snares to the more industrious and less informed part of the community.

Alexander Hamilton similarly asserted that a law rescinding a state's obligations "may be safely said to be a contravention of the first principles of natural justice and social policy." B. Wright, *The Contract Clause of the Constitution* 22 (1938). *See also Vanhorne's Lessee v. Dorrance*, 2 U.S. (2 Dall.) 304, 310 (C.C. Pa. 1795) (Patterson, J.) ("The preservation of property * * * is a primary object of the social compact"); McConnell, *Contract Rights and Property Rights: A Case Study in the Relationship Between Individual Liberties and Constitutional Structure*, 76 Calif. L. Rev. 267, 284 (1988) (Charles Pinckney asserted that the Contract Clause and other limitations of Art. I, § 10, cl. 1 were "the soul of the Constitution").

the Contract Clause. *Cf. United States v. Winstar Corp.*, 116 S.Ct. 2432, 2459 (1996) (government contracts "made in reliance on the law of contract" must be enforced) (Souter, J., joined by Stevens, Breyer, and O'Connor, JJ.); *id.* at 2477 (government contract rights are "dictated by normal principles of contract interpretation") (Scalia, J., joined by Kennedy and Thomas, JJ.).

Indeed, the Utah Supreme Court's conclusion that the Contract Clause has not been violated because the Lease is " 'subject to the laws of Utah' " (App. A 8a) directly clashes with a recent, important federal decision. *In re Workers' Compensation Refund*, 46 F.3d 813 (8th Cir. 1995). In that case, the Minnesota Legislature enacted a statute retroactively voiding various insurers' contractual rights to the refund of some $402 million in excess funds accumulated in a workers' compensation reinsurance pool. 46 F.3d at 817. Contracts between the State of Minnesota and the insurers created the reinsurance pool and established the right to the refund of the excess funds. The contracts, however, also expressly provided that they would " 'be deemed to be automatically amended to conform to any amendment' " of Minnesota law regulating the reinsurance pool. 46 F.3d at 818 (quoting contracts). The State of Minnesota argued that this "automatic amendment" clause avoided Contract Clause scrutiny of the State's retroactive abrogation of the insurers' contractual refund rights. *Id.*

This argument, identical to the Utah Supreme Court's submission below (App. A 8a), was rejected by the Eighth Circuit. The court reasoned (46 F.3d at 819):

> An expansive interpretation of the automatic amendment clause to permit complete retroactive amendment essentially deems all rights or obligations in those contracts illusory, because these rights could always be changed or obliterated. *See Continental Illinois Nat'l Bank and Trust Co. v. Washington*, 696 F.2d 692, 698 (9th Cir. 1983), *appeal dismissed*, 460 U.S. 1077 (1983). An expansive retroactive application also converts the automatic amendment

> clause into a blanket waiver of the insurance companies' right to Contract Clause protection. Contractual clauses purporting to waive constitutional rights must be clear and unambiguous. *Fuentes v. Shevin*, 407 U.S. 67, 95 (1972).

Because the "retroactive amendment" clause did "not unambiguously divest all future rights for Contract Clause protection," the court of appeals concluded that Minnesota's retroactive abrogation of the refund was unconstitutional. 46 F.3d at 821.

The Utah Supreme Court's conclusion that the Board may alter its remedies at will because the Lease is subject to Utah law cannot be reconciled with *In re Workers' Compensation Refund*. The decision below—which announces that the State of Utah did not alter a "contractual term" in tripling its own damage recovery (App. A 8a)—renders Trail Mountain's rights under the Lease "illusory" because those "rights [can] always be changed or obligated." *In re Workers' Compensation Board*, 46 F.3d at 819. The decision below effectively assumes that Trail Mountain's predecessor-in-interest, by signing the Lease, executed a "blanket waiver of . . . Contract Clause protection" and thereby relinquished "all future rights for Contract Clause protection." *Id.* That assumption, however, is fatally flawed. *Romein*, 503 U.S. at 190-91 (rejecting the assertion that by " 'provid[ing] by a law * * * that all contracts thereafter made should be subject to the entire control of the legislature' " a state could "render the Contract Clause itself entirely dependent on state law") (quoting 2 J. Story, *Commentaries on the Constitution of the United States* § 1383 at 252-53 (5th ed., 1891)); *see also United States v. Winstar Corp.*, 116 S.Ct. at 2477 (a government promise "only 'to provide [certain] treatment unless and until there is subsequent action' " is "an absolutely classic description of an illusory promise") (Scalia, J., joined by Kennedy and Thomas, JJ.).

In the words of Madison, "Bills of attainder, ex post facto laws. and laws impairing the obligation of contracts,

are contrary to the first principles of the social compact and to every principle of sound legislation." *The Federalist* No. 44 at 282 (James Madison) (C. Rossiter ed., 1961). The decision of the Utah Supreme Court disregards this fundamental principle and conflicts with the Eighth Circuit's recent holding. The Court should review this case to clarify whether the Utah Supreme Court's approach or the analysis in *In re Workers' Compensation Refund* governs a State's rights under contracts "subject" to State law. App. A 8a. Absent such clarification, and to the extent that State courts follow the decision below rather than *In re Workers' Compensation Refund*, the Contract Clause could be drained of the very meaning ascribed to it by its authors.

III. REVIEW IS WARRANTED TO ENSURE THAT THE STATE OF UTAH KEEPS ITS WORD

Precisely because the Founders believed that retroactive legislative alteration of contractual rights was a serious breach of "social justice" (*The Federalist* No. 7 at 65 (James Madison) (C. Rossiter ed., 1961), the Contract Clause has particular vigor when States alter their own contractual rights. In this context, the Clause packs a potent punch. "There is no reason to allow the State to trick a group of individuals into parting with money on one set of conditions only to find that it is bound by another." Richard A. Epstein, *Toward a Revitalization Of The Contract Clause*, 51 U. Chi. L. Rev. 703, 720-721 (1984). Review is warranted because the State of Utah is constitutionally obligated to "*keep its word.*" Laurence H. Tribe, *American Constitutional Law*, § 9-10, at 619 (2d ed., 1988) (emphasis in original, footnotes omitted).

1. The heightened scrutiny applicable to a state's alteration of its own contractual rights was enunciated in *United States Trust Co. v. New Jersey*, 431 U.S. 1 (1977). "The threshold inquiry is 'whether the state law has, in fact, operated as a substantial impairment of a contractual relationship.'" *Energy Reserves Group, Inc. v. Kansas Power & Light*, 459 U.S. 400, 411 (1983) (quot-

ing *Allied Structural Steel Co. v. Spannaus*, 438 U.S. 234, 244 (1978)). If this threshold is met, a state law violates the Contract Clause unless it is supported by an "important public purpose" and is "reasonable and necessary to serve" that purpose. *United States Trust*, 431 U.S. at 22.

This analysis is not deferential "because the State's self-interest is at stake." *United States Trust*, 431 U.S. at 25-26 (footnotes omitted); *accord*, *Energy Reserves Group, Inc. v. Kansas Power § Light Co.*, 459 U.S. 400, 412 n. 14 (1983) ("When a State itself enters into a contract, it cannot simply walk away from its financial obligations. In almost every case, the Court has held a governmental unit to its contractual obligations when it enters financial or other markets").[13] Neither impending

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[13] *See, e.g., Tyrpak v. Daniels*, 874 P.2d 1374, 1380 (Wa. 1994) (annexation of disputed port property was an unconstitutional impairment of a municipality's contracts with general obligation bondholders); *Caritas Servs., Inc. v. Dep't of Social and Health Servs.*, 869 P.2d 28, 35, 40 (Wa. 1994) (amendment reducing payments under nursing homes reimbursement act violates Contract Clause); *Bidwell v. City of Bellevue*, 827 P.2d 339 (Wa. App. 1992) (voter initiative which required convention center authority to obtain voter approval before issuing bonds unconstitutionally impaired the authority's contract with the city); *Carlstrom v. State*, 694 P.2d 1, 5 (Wa. 1985) (legislative abrogation of public teachers' previously negotiated pay raise violates Contract Clause); *19th Street Assocs. v. State*, 593 N.E.2d 265, 267 (N.Y. Ct. App. 1992) (legislative grant of new rights to tenants in derogation of state's prior consent judgment with landlord violates Contract Clause); *Ass'n of Surrogates & Supreme Court Reporters v. State*, 588 N.E.2d 51, 54 (N.Y. Ct. App. 1992) (legislative imposition of five-day lag payroll violated Contract Clause); *Bennett v. County of Nassau*, 393 N.E.2d 446, 449 (N.Y. Ct. App. 1979) (legislative abrogation of public employees' contractual right to receive cash payment for accumulated vacation pay and sick leave upon transfer violates Contract Clause); *Patterson v. Carey*, 363 N.E.2d 1146, 1152, 1153 (N.Y. Ct. App. 1977) (legislative reductions in tolls charged by parkway authority violates Contract Clause); *State ex rel. Cannon v. Moran*, 331 N.W.2d 369, 374-375 (Wis. 1983) (retroactive reduction in contractual pension benefits violates Contract Clause); *Christensen v. Minneapolis Mun. Employees Retirement Bd.*, 331 N.W.2d 740, 751-752 (Minn. 1983) (legislative discon-

"fiscal ruin," [14] other constiutional prerogatives,[15] nor the invocation of such concepts as "public trust" have been sufficient to validate significant alteration of a State's contractual rights and obligations.[16]

2. The State of Utah's alteration of Trail Mountain's Lease is unconstitutional under *United States Trust*. The State's abrogation of the 6% prejudgment interest rate established by Utah Code Ann. § 15-1-1(2) impaired a contractual relationship and that impairment (which in-

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tinuance of retired public employee's pension violates Contract Clause); *Condell v. Bress*, 983 F.2d 415, 418, 420 (2d Cir. 1993) (salary deferral program violates Contract Clause), *cert. denied*, 507 U.S. 1032 (1993); *Ass'n of Surrogates and Supreme Court Reporters v. State*, 940 F.2d 766, 773-774 (2d Cir.) ("lag payroll" law violated the Contract Clause), *cert. denied*, 502 U.S. 1058 (1991); *State of Nevada Employees Assoc., Inc. v. Keating*, 903 F.2d 1223, 1226, 1228 (9th Cir. 1990) (Nevada's termination of the right of public employees to withdraw pension contributions without penalty is an unconstitutional impairment of contractual obligations), *cert. denied*, 498 U.S. 999 (1990); *Continental Illinois Nat. Bank & Trust Co. of Chicago v. State*, 696 F.2d 692, 698, 701 (9th Cir. 1983) (initiative which imposed requirement of voter approval prior to public power authority's issuance of bonds violates Contract Clause), *appeal dismissed*, 460 U.S. 1077 (1983).

[14] *Opinion of the Justices (Furlough)*, 609 A.2d 1204, 1206 (N.H. 1992) (legislation requiring state employees to take unpaid leave violates Contract Clause; leave provision is unconstitutional even though it "is a budget-slashing device intended by the proponents to rescue the State from the prospects of fiscal ruin;" "[b]ased on the ample authority cited above, we find the bill neither reasonable nor necessary to serve an important public purpose" because "[t]he legislature has many alternatives available to it, including reducing non-contractual State services and raising taxes and fees," even though none "of these choices may be as politically feasible as the furlough program").

[15] *Park Benziger & Co. v. Southern Wine & Spirits, Inc.*, 391 So. 2d 681, 683 (Fla. 1980) (State authority to regulate liquor under the 21st Amendment does not immunize State liquor legislation from Contract Clause scrutiny).

[16] *West Indian Co., Ltd. v. Gov't of the Virgin Islands*, 844 F.2d 1007 (3d Cir. 1988) ("public trust" doctrine does not avoid Contract Clause scrutiny), *cert. denied*, 488 U.S. 802 (1988).

increased Trail Mountain's prejudgment interest liability by over $4 million) was substantial. *Romein*, 503 U.S. at 186. And, even assuming that the impairment furthered a "significant and legitimate" interest (*Energy Reserves Group*, 459 U.S. at 411) in the administration of school trust property by bolstering the receipt of "full value" (App. A 6a), the State's action was neither "reasonable" nor "necessary" to further that interest. *United States Trust*, 431 U.S. at 25.[17]

To begin with, the Board-imposed 18% interest rate *reroactively* alters the State's contract. Whatever the vagaries of Contract Clause analysis, it has long been established that retroactive impairment of contractual obligations is forbidden. *Allied Structural Steel v. Spannaus*, 438 U.S. 234, 250 (1978) (alteration of contractual obligations is unconstitutional when it "work[s] a severe, permanent, and immediate change in [contractual] relationships irrevocably and retroactively").[18]

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[17] *See, e.g., Christensen v. Minneapolis Mun. Employees Retirement Bd.*, 331 N.W.2d 740, 751 (Minn. 1983) ("correcting an inequity or a fiscal misjudgment can be a significant and legitimate public purpose, as the second prong of [the Contract Clause] test requires," but, even if a contractual alteration furthers such an interest, it is unconstitutional unless "necessary" to the furtherance of that interest; change in contractual pension benefits fails this test).

[18] Compare *Sturges v. Crowninshield*, 4 Wheat. (17 U.S.) 122 (1819) (New York law discharging debtors of their obligations upon surrender of their property violates the Contract Clause) *with Ogden v. Saunders*, 12 Wheat. (25 U.S.) 213 (1827) (state insolvency laws *can* be applied to contracts made *after* the law was enacted; *Sturges* applies only to retroactive insolvency laws).

Before the lower courts, the State of Utah asserted that the Board's 18% prejudgment interest rate is not "retroactive" because the rate is inapplicable to Trail Mountain until 1982 (the date the rate was first adopted). The Board's rate, however, is fullly retroactive. The Board has decreed (and the Utah Supreme Court has affirmed) that Trail Mountain is obligated to pay steep prejudgment interest beginning in 1982 for a contractual breach that occurred in 1979. The Board's interest 18% rate, in short, is retroactive—not only because it applies to a contract that was negotiated in 1965

In addition, the Board's penalties are not reasonable "in light of the surrounding circumstances." *United States Trust*, 431 U.S. at 31. When the Lease was negotiated, the State of Utah had the opportunity to obtain an agreement regarding the payment of prejudgment interest in excess of the 6% rate established by § 15-1-1(2) if, in the judgment of the State, a higher rate was necessary to insure the receipt of "full value" for the disposition of school trust asests. *E.g.*, Utah Code Ann. § 15-1-1(1) (1953) (permitting parties to stipulate "any rate of interest" for contractual breach). However, by not obtaining an agreement to pay a higher rate, the State necessarily concluded that a lessee's payment of the 6% "legal rate" would provide the State with "full value." *Accord*, App. D 39a (trial court finding that State would receive "full value" upon payment of the "legal rate of interest on delinquent payments"). Because the need to obtain full value for the Lease was "not unknown" when the Lease was issued, the State's retroactive conclusion that an 18% interest rate better serves its interests is plainly unreasonable. *United States Trust*, 431 U.S. at 32.

The Board-imposed interest rate, finally, is not only unreasonable, it is not *necessary* to further the State's interest in the protection of school trust lands. Even if the State, as the trustee of school trust lands, is somehow entitled to prejudgment interest higher than 6%, "full value" could not possibly validate the Board's 18% figure.

Prejudgment interest, of course, merely compensates the State for the time value of money it should have received under the Lease. *E.g.*, *L&A Drywall v. Whitmore Const. Co.*, 608 P.2d 626, 629 (Utah 1980) (prejudgment interest under § 15-1-1(2) represents "damages due to the opposing party's delay in tendering the amount owing under an obligation"). Beginning in 1982, when the Board sanctioned its 18% rate and continuing *every* quarter thereafter until this matter went to trial, the Board's

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long before it was adopted—but because it applies to a contractual lapse that occurred *prior* to its adoption.

interest rate significantly exceeded the rates of return received by the State on cash deposited in the school trust account—at times by as much as 10 percentage points. App. J 89a. The Board's extraordinarily high prejudgment interest rate, therefore, is hardly "necessary" to insure that the State is compensated for the time value of any money Trail Mountain improperly withheld from the school trust account. App. E 73a (Bench, J., dissenting) ("The requirement that the State receive full value at the time of the disposition of the State's interest is a far cry from authorizing the State unilaterally to modify material terms of its existing contracts").

"[A] State is not free to impose a drastic impairment when an evident and more moderate course would serve its purposes equally well." *United States Trust*, 431 U.S. at 31. The interest rate imposed by the Board is not necessary to further the State's obligations as trustee of school trust lands and, therefore, is unconstitutional. The Utah Supreme Court's refusal to even acknowledge this point demands the Court's attention.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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